LADANG HOLYROOD

v.

AYASAMY MANIKAM & ORS

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ARIFIN ZAKARIA JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: A02-694-1999]
20 APRIL 2004

LABOUR LAW: *Employment - Transfer - Right of employer - Principles applicable - Whether an implied right - Whether right to transfer implied notwithstanding absence of express provision in contract of service - No contract of service, whether right still exists - Whether employee's terms and conditions of service materially changed - Whether a relocation or transfer*

The appellant was a rubber estate known as Ladang Holyrood while the respondents were its employees. As the appellant had wanted to fell the rubber trees in the division where the respondents worked, it issued an order directing the respondents to report for work in another division of the estate. The respondents refused to comply with the order and, instead, asked for termination and lay-off benefits pursuant to the Employment (Termination And Lay-Off Benefits) Regulations 1980. The appellant declined the request and considered the respondents as having abandoned their employment.

The respondents then brought a claim under s. 70 of the Employment Act 1955 for annual-leave pay, indemnity in lieu of notice and termination benefits. The Assistant Director General of Labour allowed the claim for annual-leave pay but dismissed all the other claims. Dissatisfied, the respondents appealed to the High Court and the learned judge held that the respondents were entitled to be paid indemnity in lieu of notice as well as termination benefits.

Aggrieved, the appellant appealed to the Court of Appeal. Before the justices of appeal, it was submitted that the 'relocation of workers' in a rubber estate is a crucial as well as a conventional industry-practice, and that in any event, the appellant, as the employer, would have the right and prerogative not only to relocate but also to transfer the respondents within the estate. The respondents, on the other hand, contended that the appellant had no right to transfer them because the contract of service and/or the collective agreement in question did not contain a 'transferability clause'.

Held (allowing the appeal and reversing the High Court)
Per Arifin Zakaria JCA delivering the judgment of the court:

[1] The learned judge was right to have come to the conclusion that the 'relocation order' was in effect a 'transfer order'. Indeed, the distance between the two divisions of the estate was more than 5km, and the respondents had always been working in the same division wherein their living quarters were situated. It was also not the established practice of the appellant to transfer its workers from one division to another. (p 703 a-b)

[2a] Nevertheless, an employer always has the implied right to transfer its employees. As the right is one that is 'implied', no express term in the contract of service is necessary. The right to transfer exists even in the absence of a contract of service unless there is a contract to the contrary. The transfer, however, must not be actuated by mala fide or any improper or indirect motive and must not involve a change in the terms of employment to the detriment of the employee. (pp 703 d-h & 704 a-h)

[2b] Based on the collective agreement and the facts of the case, the respondents' transfer would not have materially changed their terms and conditions of service. Any variance would have been too trivial to be of any consequence. Indeed, the learned judge had interpreted the respondents' terms of employment too stringently. (pp 705 a-h & 706 a-d)

[Orders of learned judge set aside; decision of Assistant Director General of Labour reinstated.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu adalah sebuah ladang getah yang dikenali sebagai Ladang Holyrood sementara responden adalah pekerja-pekerjanya. Perayu berhasrat untuk menebang pokok-pokok getah di bahagian ladang di mana responden bekerja, dan kerana itu telah mengeluarkan arahan supaya responden melapor diri untuk bekerja di bahagian lain ladang. Responden enggan mematuhi arahan, malah sebaliknya menuntut faedah-faedah penamatan kerja di bawah Peraturan-Peraturan Kerja (Faedah-Faedah Penamatan dan Rentikerja Sentara) 1980. Perayu menolak tuntutan dan menganggap responden sebagai telah meninggalkan pekerjaan mereka.

Responden kemudian memfail tuntutan di bawah s. 70 Akta Pekerjaan 1955 memohon bayaran cuti tahunan, indemniti sebagai ganti notis dan faedah-faedah penamatan kerja. Penolong Ketua Pengarah Buruh membenarkan tuntutan untuk bayaran cuti tahunan tetapi menolak tuntutan-tuntutan lain. Merasa tidak puas

hati, responden merayu ke Mahkamah Tinggi di mana yang arif hakim memutuskan bahawa responden berhak dibayar indemniti sebagai ganti notis dan faedah penamatan kerja.

Terkilan, perayu merayu ke Mahkamah Rayuan. Di hadapan hakim-hakim rayuan, ianya dihujahkan bahawa di ladang getah 'penempatan semula pekerja' adalah sesuatu yang sangat penting dan merupakan amalan konvensional industri. Dihujahkan juga bahawa perayu, selaku majikan, harus mempunyai hak dan keistimewaan bukan sahaja untuk menempatkan semula responden malah untuk memindahkan mereka ke bahagian-bahagian lain ladang. Responden mengatakan bahawa perayu tidak berhak memindahkan mereka oleh kerana kontrak perkhidmatan dan/atau perjanjian bersama tidak mengandungi apa-apa mengenai 'fasal pemindahan'.

Diputuskan (membenar rayuan dan mengakas keputusan Mahkamah Tinggi) Oleh Arifin Zakaria HMR menyampaikan penghakiman mahkamah:

[1] Yang arif hakim betul dalam keputusannya bahawa 'perintah penempatan semula' adalah sebenarnya satu 'perintah untuk pindah'. Jarak di antara dua bahagian tersebut malahan adalah lebih dari 5km, dan responden sejak sekian lama telah bekerja di dalam bahagian yang sama di mana terletaknya kuarters kediaman mereka. Ia juga bukan amalan biasa perayu untuk memindahkan pekerja-pekerjanya dari satu bahagian ke bahagian yang lain.

[2a] Walau bagaimanapun, seseorang majikan sentiasa mempunyai hak tersirat untuk memindahkan pekerjanya. Oleh kerana hak tersebut adalah hak 'tersirat', maka peruntukan mengenainya tidaklah perlu disebut secara nyata di dalam kontrak perkhidmatan. Hak untuk memindah juga wujud sekalipun dengan ketiadaan kontrak perkhidmatan, kecuali jika terdapat perjanjian sebaliknya. Namun begitu, pemindahan tidak boleh dilakukan secara mala fide atau dengan motif terselindung dan tidak harus melibatkan apa-apa perubahan pada terma perkhidmatan yang merugikan pekerja.

[2b] Berdasarkan perjanjian bersama dan fakta kes, pemindahan responden tidak akan mengubah terma dan syarat perkhidmatan mereka dengan secara material. Perubahan-perubahan yang berlaku adalah kecil dan tidak menjejaskan responden. Hakikatnya, yang arif hakim telah mentafsirkan terma-terma perkhidmatan responden dengan amat ketat sekali.

Perintah yang arif hakim diketepikan; keputusan Penolong Ketua Pengarah Buruh disahkan kembali.]

Case(s) referred to:

BP Malaysia Sdn Bhd v. Chua Among [1995] 1 ILR 357 ***(refd)***

Georgetown Pharmacy (M) Sdn Bhd, Ipoh v. National Union of Commercial Workers [1992] 2 ILR 377 ***(refd)***

Kesatuan Kebangsaan Pekerja-pekerja Ladang v. Kesatuan Pekerja-pekerja Di dalam Kumpulan Guthrie Sdn Bhd v. Valaithan Raman Nair & Ors [1990] 1 CLJ 48; [1990] 2 CLJ (Rep) 298 HC ***(dist)***

Metaldek Industries Sdn Bhd v. Kamarudin Tokiman & Ors [1999] 2 CLJ 761 HC ***(dist)***

Shalimar Paints Ltd v. Third Industrial Tribunal, Calcutta [1971] 11 LLJ 58 ***(refd)***

Soon Seng Cement Products Sdn Bhd & Anor v. Non-Metalic Mineral Products Manufacturing Employees's Union [1996] 1 ILR 414 ***(refd)***

Legislation referred to:

Employment Act 1955, ss. 12(3)(e), 70

Other source(s) referred to:

BR Ghaiye, *Misconduct in Employment*, p 238

For the appellant - A Ramadas (M Jothi); M/s Ramadas & Assocs
For the respondent - P Kuppusamy (VK Raj); M/s P Kuppusamy & Co

[Appeal from High Court, Taiping, Civil Appeal No: 11-11-96 (T)]

Reported by Gan Peng Chiang

JUDGMENT

Arifin Zakaria JCA:

The Background Facts

The facts in this case are not in dispute. They are briefly as follows. Except for the 1st respondent all the respondents in this case were in the employment of the appellant as rubber tappers. The 1st respondent was a mandore (tapping) also in the employment of the appellant. Ladang Holyrood, the appellant herein, comprised of two divisions namely, the Main Division Estate and the Bukit Rhona Division Estate. The respondents were attached to the Bukit Rhona Division Estate. By a letter dated 18 June 1994 the respondents were told by the appellant that the rubber trees in the said division will be felled for replanting purposes. As a consequent the respondents would be transferred to the Main Division with effect from 1 July 1994. The respondents did not agree to the proposed transfer. Instead they asked the appellant to pay them termination and lay off benefits pursuant to The Employment (Termination and Lay Off Benefits) Regulations 1980.

By letter dated 30 June 1994 the appellant told the respondents to comply with the transfer order failing which the appellant would resort to the various options open to the appellant. This was followed by the letter of 6 July 1994 wherein the respondents were directed to report for work at the Main Division on or before 20 July 1994 failing which they will be deemed to have abandoned their employment. The respondents did not comply with the said order, but instead they brought a claim under s.70 of the Employment Act 1955 ("the Act") claiming the following reliefs, namely, the annual leave pay, indemnity in lieu of notice and the termination benefits. The claim went before the Assistant Director of Labour ("Assistant Director"). He allowed their claim for annual leave pay but dismissed all other claims.

The respondents then appealed to the High Court which allowed the appeal and ordered that the respondents be paid the indemnity in lieu of notice and the termination benefit in addition to the annual leave pay. The appellant now appeals to this court against the decision of the learned judge. After having heard arguments of the parties we adjourned the matter for our consideration and decision. We now give our decision.

The Contentions Of The Parties

We were told that the issue in this case is of considerable importance to the plantation industry as this concerns the 'relocation of workers', which the learned counsel for the appellant contended, is a normal practice in the industry. He emphasised that such a practice is a normal occurrence in the industry arising from the need to have the old rubber trees replanted with new ones in order to increase the yield. He said the practice has been, to relocate workers to the new area while the old trees are being felled. This he said is precisely what happened in the present case. In the alternative he argued even if the court holds that the relocation is in fact tantamount to a transfer as alleged by the respondents the learned trial judge had erred in law in holding that the appellant has no right to transfer the respondents in the present case. He contended that it is within the prerogative of the appellant, as the employer, to transfer the respondents any where within the same organization for as long as the transfer is reasonable and not tainted by any ulterior motive.

He said, in this case it is not disputed that the two divisions form part of the same estate with a common management. It is being run by a single manager and assisted by two assistant managers. For all intent and purposes it is a single entity. The respondents were paid by the appellant and would continue to be paid by the appellant even after the transfer to the Main Division. That is to say the respondents would continue to be in the same employment even after the said transfer. In the circumstances, he submitted there is no cause for complaint.

The learned counsel for the respondents submitted that the learned judge was right in his decision on the premise that the contract of service as well as the collective agreement do not contain the transferability clause. In the absence of such a clause he contended the appellant has no right to transfer the respondents.

The Issues

From the facts it is clear that there is no written contract of service between parties. However, there is a collective agreement, which had been taken cognizance of by the Industrial Court. The agreement was between the Malayan Agricultural Producers Association (MAPA), a trade union of employers in the plantation industry and the National Union of Plantation Workers, a trade union of employees in the plantation industry. There is no transferability clause in the agreement.

The first issue as rightly stated by the learned judge is whether the order given by the appellant in this case was a transfer or merely a relocation of task as contended by the appellant. The Assistant Director in his decision held the view that this was merely a relocation of task rather than a transfer.

The learned judge took the opposite view. Relying on the Indian case of *Shalimar Paints Ltd. v. Third Industrial Tribunal, Calcutta* [1971] 11 LLJ 58, he held that in the circumstances of this case the movement of tappers from one division to another is a transfer within the meaning of the word "transfer" appearing in s. 12(3)(e) of the Act. In that case Mr. Justice T.K. Basu came to consider the word 'transfer' and he expressed the following view:

> The expression 'transfer' in my opinion connotes that an employer has more than one place of business, and the employee is called upon to work in a different place of business from the one in which he worked previously.

In the present case the learned judge held that the "relocation order" is in effect a transfer of the respondents from one division to another. He came to this finding on the premise that the distance between the two divisions is more than five km. apart. He further relied on the testimony of the first respondent that in the 22 years he had been working in the estate there had never been any transfer of workers from one division to the other. For those reasons the learned judge concluded that "the two divisions, albeit belonging to the same owner, were different places of employment".

Having said that, the learned judge then went on to hold that it is for the appellants to satisfy the court that the contract of service did contain such a clause. From the evidence before him he concluded that such a clause could not be so implied.

Having considered the matter we are of the view that the learned judge was right in holding that in the circumstances the so-called relocation order was in fact a transfer order. We came to this finding for the following reasons:

(a) the distance between the two divisions is not less than 5km.;

(b) the respondents had always been working in the division and were provided living quarters in the same division; and

(c) it has not been the practice to transfer workers from one division to another.

We now turn to the next issue, that is, whether the appellant has any right under the contract of service to transfer the respondents to the main Division. In *Soon Seng Cement Products Sdn. Bhd & Anor. v. Non-Metallic Mineral Products Manufacturing Employees's Union* [1996] 1 ILR 414 award no. 107 of 1997 the same issue came to be considered by the Industrial Court. There the court made the following observation which we think is highly pertinent to the issue before us:

> It is well established in Industrial Law that the right to transfer an employee from one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management and the Industrial Court will ordinarily not interfere. But if the transfer is actuated with improper motive, it will attract the jurisdiction of the Court. The power to transfer is, therefore, subject to, according to Ghaiye's Misconduct in Employment (at pages 254 and 255), the following well recognised restrictions:
>
> (a) there is nothing to the contrary in the terms of employment;
>
> (b) the management has acted bona fide and in the interests of its business;
>
> (c) the management is not actuated by any indirect motive or any kind of *mala fide*;
>
> (d) the transfer is not made for the purpose of harassing and victimising the workmen; and
>
> (e) the transfer does not involve a change in the conditions of service.
>
> And this right of transfer is also embodied in the Industrial Relations Act 1967, where it states that the company has the right to transfer its employees within the organisation so long as such transfer "does not entail a change to the detriment of an employee in regard to the terms of employment." – Section 13 of the Industrial Relations Act 1967.

Similarly B.R. Ghaiye in his book *Misconduct in Employment* p. 238 stated as follows:

> It is generally held that the right to transfer an employee is an implied right of the employer and, therefore, no express term in the contract is necessary. The right exists even in the absence of contract unless there is a contract to the contrary. The implied right of an employer to transfer is available even when an employee is a probationer. In the absence of anything in the contract of service, general right of the management to transfer will remain.

This proposition of law may be found in a number Industrial Court awards. (See, Kesatuan kebangsaan *Pekerja-Pekerja Ladang v. Kesatuan Pekerja-Pekerja Di dalam Kesatuan Sekerja* [1992] 2 ILR 326; *Georgetown Pharmacy (M) Sdn. Bhd. Ipoh v. National Union of Commercial Workers* [1992] 2 ILR 377 dan *BP Malaysia Sdn. Bhd. v. Chua Among @ Chai See Mong* [1995] 1 ILR 357)).

This right to transfer is not without restriction. In *Assembly Services Sdn Bhd/ UMW Engineering Sdn Bhd & UMW Holdings Sdn. Bhd. and Motor Assemblers Supervisory Staff Union* (Award 136 of 1985) the court observed:

> A company has the right to transfer its employees within its organisation, provided that such transfer does not entail a change to the detriment of an employee in regard to his terms of employment. It is well-established in industrial law that the right to transfer an employee from one department to another, or from one part of an establishment to another, or from one branch to another, or from one company to another within the organisation, is the prerogative of the management and the Industrial Court will ordinarily not interfere. But if the transfer is actuated with improper motive, it will attract the jurisdiction of the court. The power to transfer is thus subject (according to Ghaiye's Misconduct in Employment) to the following well-recognised restrictions:
>
> (a) there is nothing to the contrary in the terms of employment;
>
> (b) the management has acted *bona fide* and in the interest of its business;
>
> (c) the management is not actuated by any indirect motive or any kind of *mala fide.*
>
> (d) the transfer is not made for the purpose of harassing and victimizing the workman; and
>
> (e) the transfer does not involve a change in the conditions of service.
>
> Whether a transfer entails a change to the detriment of an employee in regard to his terms of employment, or whether the transfer is *bona fide* is a question of fact for the court to determine.

At this stage we think it is appropriate to consider the facts and circumstances of the present case. The principle ground relied upon by the respondents in resisting the transfer is that the transfer was to the detriment of the respondents. This is because the Main Division is located some 5 km. from the Bukit Rhona Division hence it would entail additional travelling time roughly around 15 minutes daily. The respondents further contended if they were to move to the quarters in the Main Division as proposed by the appellant they would incur additional cost in terms of bus fare for their school going children. The difference in the fare per child according the 1st respondent was around RM3 per month. The other grievance by the respondents is that their income would suffer; they claimed that in the Main Division the yield was lower than that in the Bukit Rhona Division due to the age of the trees.

The appellant, however, contended that the basic salary for the task was the same as set out in the collective agreement. Further the appellant said the respondents had not adduced any evidence to support their contention.

From of the collective agreement it is clear that an employee may be required to tap rubber in either the low yielding area as well as in the high yielding area. Article 12 of the agreement provides that a rubber tapper working in low yielding field shall be paid a suitable rate and the average earnings of a rubber tapper in such field or area shall not fall below the basic wage. Based on the above we do not think that the fact that the transfer would result in the respondents having to work in low yielding area is any proper basis for the respondents to reject the transfer. The respondents were bound by the collective agreement. In this regard we agree with the Assistant Director. We are also of the view that the case of *Kumpulan Guthrie Sdn. Bhd. v. Valaithan a/l Raman Nair & Ors.* [1990] 1 CLJ 48; [1990] 2 CLJ (Rep) 298, relied upon by the learned judge is, on the facts, clearly distinguishable from the present case.

On the extra cost in terms of the bus fare for their children if they were to move to the Main Division our view is that the respondents were not forced to move to the Main Division. In fact they were given the choice either to stay on in the existing quarters or to move to the quarters in the Main Division. In any event in our view the claim here is far too trivial to be of any consequence.

In allowing the appeal the learned judge also took into consideration the extra 20 minutes each day that the respondents would take to travel to work. In his view this would amount to altering the terms and conditions of service to a less favorable one. With respect to the learned judge we are of the opinion that he had interpreted the terms and conditions of service far too stringently.

We do not think this constitutes a material change in the terms and conditions of service. Far from it. This is unlike in the case of *Metaldek Industries Sdn. Bhd. v. Kamarudin Tokiman & Ors.* [1999] 2 CLJ 761 where the relocation involves a distance of some 250 km. The effect of the transfer in the present case is not as drastic as suggested by learned counsel for the respondents.

Finally with the regard to the payment of indemnity in lieu of notice as ordered by the learned judge under s. 13 of the Act, it is to be noted that he made the order on the premise that there is no transferability clause in the contract of service. In the circumstances he held that s. 12(3)(e) of the Act applies to the respondents. However, with respect to the learned judge, for the reasons given earlier, we are of the view that, on conditions that the employer has acted *bona fide* and in the interest of its business and is not actuated by any indirect motive or any kind of *mala fide*, the right to transfer is an implied right of the employer. In the circumstances of this case we find that the Appellant had acted in accordance with these principles. For those reasons we hold that s. 12(3)(e) of the Act does not apply to the present case. Hence, the order of the learned judge for payment of indemnity in lieu of notice under s. 13 of the Act is hereby set aside.

Conclusion

For the above reasons we allowed the appeal with costs here and below. The order of the learned judge is set aside and the order of the Assistant Director is reinstated. Deposit to be refunded to the appellant.